

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTONIO BACHAALANI NACIF and
WIES RAFI, individually and on behalf of all
other similarly situated,

Plaintiffs,

v.

ATHIRA PHARMA, INC.; and LEEN
KAWAS, Ph.D.,

Defendants.

No. 2:21-cv-00861-TSZ
(Consolidated with 21-cv-00862-TSZ and
21-cv-00864-TSZ)

**UNDERWRITER DEFENDANTS’
MOTION FOR ENTRY OF JUDGMENT
UNDER RULE 54(b)**

NOTE ON MOTION CALENDAR:
Friday, January 6, 2023

I. INTRODUCTION

In its decision on defendants’ motion to dismiss entered on July 29, 2022, the Court dismissed all of plaintiffs’ claims against the underwriters for two registered public offerings of common stock by Athira Pharma, Inc. (“Athira”) – defendants Goldman Sachs & Co. LLC, Jefferies LLC, Stifel, Nicolaus & Company, Inc., and JMP Securities LLC (the “Underwriter Defendants”). Thereafter, plaintiffs chose not to seek leave to amend the complaint as against the Underwriter Defendants. Last Friday, the deadline under the Court’s scheduling order to add claims and parties elapsed. As a result of these developments, the Underwriter Defendants are not parties even though litigation of certain claims continues against Athira and its former chief executive officer. Under the

1 circumstances presented, there is no just reason for the Court to delay entering judgment in favor
2 of the Underwriter Defendants. Those defendants therefore respectfully request that the Court
3 enter final judgment in their favor pursuant to Fed. R. Civ. P. 54(b).

4 **II. BACKGROUND**

5 In its opinion and order entered on July 29, 2022, the Court dismissed every claim that had
6 been asserted against the Underwriter Defendants in plaintiffs' consolidated amended complaint.
7 ECF No. 89. The Court granted plaintiffs an opportunity to replead those claims, but it set a
8 deadline for doing so of August 19, 2022. *Id.* at 50. Plaintiffs elected not to amend the claims,
9 which the Court acknowledged in an order entered on August 24, 2022. ECF No. 91 at 1. Plaintiffs
10 since have stated that they do not intend to amend their claims against the Underwriter Defendants,
11 electing to give up that opportunity "to avoid delay and proceed expeditiously to discovery for
12 their [surviving] claims based on Statement 3" against Athira and its former chief executive officer
13 Leen Kawas, Ph.D. ECF No. 92 at 2 n.2.

14 On November 2, 2022, the Court entered a scheduling order to govern proceedings on the
15 remaining claims against Athira and Dr. Kawas. ECF No. 100 at 1. The scheduling order set
16 December 16, 2022 as the deadline for joining additional parties. *Id.* That deadline now has
17 passed.

18 Although the claims against the Underwriter Defendants have been finally addressed, the
19 Court allowed plaintiffs to proceed with their remaining "Securities Act § 11 claim against [Dr.
20 Leen] Kawas and Athira, as well as their Securities Act § 15 claim against Kawas, with respect to
21 Statement 3." ECF No. 95 at 3. The remaining claims against other defendants are subject to a
22 schedule under which fact and expert discovery will occur throughout 2023 and into 2024, with a
23 trial date no earlier than September 2024. ECF No. 100 at 2.

24 **III. ARGUMENT**

25 Rule 54(b) of the Federal Rules of Civil Procedure provides that "[w]hen an action presents
26 more than one claim for relief ... or when multiple parties are involved, the court may direct entry of

1 a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly
2 determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b). “Rule 54(b) certification is
3 proper if it will aid expeditious decision of the case.” *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797
4 (9th Cir. 1991) (quotation omitted).

5 There are two requirements for certification and entry of a final judgment under Rule 54(b):
6 *First*, a preliminary ruling must be “a ‘judgment’ in the sense that it is a decision upon a cognizable
7 claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual
8 claim entered in the course of a multiple claims action.’” *Curtiss-Wright Corp. v. Gen. Elec. Co.*,
9 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956)).
10 *Second*, the Court must consider whether there is any just reason for delay, which requires
11 “tak[ing] into account judicial administrative interests as well as the equities involved” for the
12 parties themselves. *Id.* These standards require a “pragmatic approach focusing on severability
13 and efficient judicial administration.” *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819
14 F.2d 1519, 1525 (9th Cir. 1987) (affirming certification of partial summary judgment rulings
15 because they “effectively narrowed the issues, shortened any subsequent trial by months, and
16 efficiently separated the legal from the factual questions”).

17 Applying these factors, entry of judgment in favor of the Underwriter Defendants now
18 plainly is warranted. The Court’s July 29, 2022 dismissal ruling finally and completely disposed
19 of all claims asserted against the Underwriter Defendants in this action. The deadline for plaintiffs
20 to amend those claims has passed, ECF No. 91 at 1, and, according to plaintiffs, they consciously
21 elected not to seek to replead their claims against the Underwriter Defendants in order “to avoid
22 delay and proceed expeditiously with respect to the claims that were not dismissed against Athira
23 and Dr. Kawas.” ECF No. 92 at 2 n.2. Plaintiffs accordingly did not attempt to assert any claims
24 against the Underwriter Defendants before the deadline to join additional parties passed on
25 December 16, 2022.
26

1 The dismissed claims against the Underwriter Defendants are separable from the remaining
2 claims, and entry of judgment now in favor of the Underwriter Defendants will not interfere with
3 litigation of those claims. As the Ninth Circuit has explained: “where a suit involves multiple
4 claims,” the district court acts “as ‘dispatcher,’ to evaluate the ‘interrelationship of the claims’ and
5 determine in the first instance ‘whether the claims under review [are] separable from the others
6 remaining to be adjudicated.’” *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 576 (9th
7 Cir. 2018) (quoting *Curtiss-Wright*, 446 U.S. at 8). Here, the Court’s July 29, 2022 Order has
8 already acknowledged that the “analysis under Securities Act § 11 is different” for the Underwriter
9 Defendants than for Kawas and Athira. ECF No. 89 at 42. The Court subsequently denied a
10 motion for reconsideration of that aspect of its ruling. The Underwriter Defendants also have no
11 connection to plaintiffs’ surviving “controlling person” claim against Dr. Kawas under Securities
12 Act § 15. Plaintiffs never have alleged that the Underwriter Defendants were “controlling persons”
13 of Athira. *See* Compl., ECF No. 74 at 60.

14 Conversely, deferring entry of judgment in favor of the Underwriter Defendants until the
15 remaining claims have been adjudicated would impose avoidable burden and expense. Litigation
16 of those remaining claims could take years to complete given the complexity of the litigation.
17 Under the scheduling order entered by the Court early last month, fact discovery will not be
18 completed until late 2023 and expert discovery will not be completed until January 2024, with a
19 trial no earlier than September 2024. ECF No. 100 at 1-2. Unless judgment is entered in their
20 favor now, the Underwriter Defendants will be required to incur the burden and expense associated
21 with remaining a party, including review of filings by the parties in active litigation to monitor
22 their possible impact on the Underwriter Defendants. Further, the risk would remain that plaintiffs
23 might reverse course at some indeterminate date in the future and seek to bring the Underwriter
24 Defendants back into the case.

25 That risk also could impact the Court. If plaintiffs somehow were successful in belatedly
26 reviving their claims, despite their conscious decision not to replead them before the Court’s stated

1 deadline, then this Court would be required to revisit other interlocutory rulings, such as class
 2 certification or summary judgment, not to mention the possible impacts on trial. Entering final
 3 judgment now in favor of the Underwriter Defendants will “aid in the expeditious decision” of the
 4 case, and that supports a finding that there is no just reason for delay for doing so. *Sheehan v.*
 5 *Atlanta Int’l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987).

6 IV. CONCLUSION

7 The Underwriter Defendants respectfully request, pursuant to Rule 54(b), that the Court
 8 (1) find that there is no just reason for delay in entering judgment in favor of the Underwriter
 9 Defendants as to all claims asserted against them in this matter; and (2) direct the Clerk of the
 10 Court to enter judgment in favor of the Underwriter Defendants.

11
 12 Respectfully submitted this 19th day of December, 2022.

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JMP Securities LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record for the parties.

Dated this 19th day of December, 2022.

s/ Paige Plassmeyer

Paige Plassmeyer, Legal Practice Specialist